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No. 87-1958

In the Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS M. GIARDINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction for obstructing a criminal investigation, in violation of 18 U.S.C. 1510.

2. Whether the trial court properly admitted expert testimony concerning organized crime.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 842 F.2d 1380.

JURISDICTION

The judgment of the court of appeals (Pet. App. 62a-63a) was entered on March 28, 1988. The petition for a writ of certiorari was filed on May 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of aiding and abetting the receipt of a bribe in violation of the Taft-Hartley Act, 29 U.S.C.

186(a)(2) and (b)(1) and 18 U.S.C. 2; one count of obstructing a criminal investigation, in violation of 18 U.S.C. 1510; and one count of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (RICO conspiracy).[1] Petitioner was sentenced to concurrent five-year terms of imprisonment on the conspiracy and obstruction counts and to a one-year term on the Taft-Hartley count. Petitioner was also fined a total of $40,000. The court of appeals affirmed (Pet. App. 1a-61a).

1. Petitioner and his co-defendants, George Daly and Julie Miron, were all associates of the Gambino organized crime family. Among its other illegal activities, the Gambino familiy had infiltrated and gained control of a number of labor unions in New York. Paul Castellano was the head of the Gambino family. Petitioner was an aide to Castellano specializing in labor matters (Pet. App. 41a). Daly, in addition to his Gambino family connections, was a business agent for Local 638 of the Steam Fitters Union (*id.* at 6a-8a).

In 1981, Matthews Industrial Piping Co. was awarded a $10 million contract to rebuild Mobil Oil Corporation's deep water terminal and pipeline facility at Port Mobil in Staten Island, New York. Robert Matthews, the owner of the company, sought to bypass Local 638 of the Steam Fitters Union by using less expensive welders from out of state. Matthews paid a $5,000 bribe to Daly to permit non-

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[1] Petitioner was acquitted by the trial court of a second Taft-Hartley violation. Co-defendant George Daly was convicted of two Taft-Hartley violations and acquitted of one. The trial court dismissed the RICO conspiracy charge against Daly at the close of the government's case. Daly's convictions were affirmed by the court of appeals in the same opinion that dealt with petitioner's claims. A third co-defendant, Julie Miron, was convicted on the same charges as petitioner, but Miron's appeal was heard separately and is still pending.

union welders to work on the project. When the work began, however, Local 638 picketed the job site. Matthews met with Daly again and gave him another $5,000, but his labor troubles continued. Pet. App. 8a-10a.

In January 1982, Matthews consulted Miron about his problems with Local 638. Miron said he could buy labor peace for Matthews if Matthews would "pass out" $100,000 to various people. Matthews agreed to do so, and a few weeks later he delivered $50,000 in cash to Miron's home. Miron gave half of that money to Daly and $15,000 to Castellano, who in turn gave at least $4,000-$5,000 to petitioner. Matthews paid another $50,000 to Miron some months later. Pet. App. 10a-11a.

Despite those payments, in May 1982 Matthews had to sign a collective bargaining agreement with Local 638 that obligated him to hire union welders. As a result, his labor costs on the Port Mobil project were higher than anticipated. Accordingly, he contacted Miron on several occasions and demanded the return of his money. In May 1983, Matthews sent a registered letter to Miron threatening to go to the authorities if at least some of his money was not returned. That same month, Matthews met with Daly and threatened to go to the FBI. Pet. App. 11a-12a.

On three occasions in May and June 1983, petitioner, Castellano, and Miron discussed the payments they had received from Matthews. On May 5, petitioner told Castellano that Daly had called the previous day to discuss Matthews' threat to go to the authorities. Castellano expressed annoyance at Daly for failing to follow through on his promise of labor peace and for taking the initial $10,000 from Matthews without Castellano's approval. Castellano ultimately determined that Matthews should be repaid at least $25,000 of the $100,000 he had paid, although even that, he said, "may not be enough" to keep Matthews from going to the authorities. On June 2, peti-

tioner returned to Castellano and reported that Daly said he had returned some money to Matthews. Four days later, Miron told Castellano that he had retrieved $25,000 from Daly and would return it to Matthews. In keeping with Castellano's orders, Miron returned a total of $50,000 to Matthews in the spring or summer of 1983. Pet. App. 15a-16a.

2. On appeal, petitioner contended that the evidence was insufficient to sustain his convictions and that the trial court improperly admitted expert testimony concerning organized crime. The court of appeals affirmed. The court first held (Pet. App. 40a-44a) that there was ample evidence to show that petitioner had aided and abetted Daly's receipt of part of Matthews' $100,000 payment, in violation of the Taft-Hartley Act.[2] The court further held (*id.* at 44a-58a) that there was sufficient evidence to support petitioner's conviction for obstructing a criminal investigation, in violation of 18 U.S.C. 1510. The jury could reasonably conclude from the evidence, the court held (Pet. App. 46a), "that the $50,000 payment was made to Matthews in response to his threats to go to the authorities in 1983."

The court rejected (Pet. App. 53a) petitioner's suggestion that the "mere return to a potential informant of his own funds, especially where the informant had been a co-conspirator of the defendant" was not encompassed by Section 1510. The court noted (Pet. App. 53a) that the plain terms of Section 1510 apply to "any person" and do not exclude those who have themselves participated in the crimes to be disclosed. The court was also unpersuaded (Pet. App. 55a) by petitioner's claim that "the money repaid to Matthews was not a bribe to dissuade him from

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[2] Petitioner has not sought review of that aspect of the court of appeals' ruling.

going to the FBI but was merely a return to him of part of his payment because the defendants regretted not having given him the labor peace he had sought to buy." The court noted (*id.* at 56a) that "[t]he jury was properly instructed on this question" and that "there was ample evidence from which it could infer that the $50,000 payment to Matthews was intended to purchase his silence." [3]

The court also rejected petitioner's contentions that there was no ongoing federal investigation to obstruct and that, to the extent that petitioner and his co-defendants were concerned about an investigation, it was a state rather than a federal investigation. The court noted (Pet. App. 50a) that the conversations among the defendants that were intercepted as a result of electronic surveillance at Castellano's home were obtained by the FBI as part of "an ongoing investigation into the infiltration of labor unions by the Gambino crime family." [4] The court also stated that remarks in the intercepted conversations that Matthews planned to go to a "Task Force" did not show that only a state investigation was in question. The court noted (*id.* at 52a) that there were specific references in the conversations to the FBI and to a Congressman to whom Matthews was supposedly connected. The court thus concluded (*ibid.*) that "there was sufficient evidence from which the jury could infer both that there was a federal in-

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[3] The court noted (Pet. App. 54a-55a) that "Matthews had, in bribing the defendants, parted with ownership of the $100,000; he plainly did not have an enforceable right either to recover those funds or to win damages for breach of his bargain."

[4] The court thus found it unnecessary to reach the question it had specifically left open in *United States* v. *Siegel*, 717 F.2d 9, 21 (2d Cir. 1983), as to whether "§ 1510 requires the existence of an actual criminal investigator or that an ongoing criminal investigation be in progress."

vestigation and that the defendants feared that Matthews would make his disclosures to federal officials."

Finally, the court held (Pet. App. 28a-37a) that the district court did not abuse its discretion in permitting an FBI agent to give "expert testimony that was relevant to provide the jury with an understanding of the nature and structure of organized crime families" (*id.* at 33a). The court noted that the agent's testimony provided useful background for the jury and helped identify some figures and define some jargon that was used in the intercepted conversations. "Notwithstanding [petitioner's] contention that there was no need for expert testimony," the court concluded (*id.* at 34a-35a), "the trial court's view that these were matters as to which such testimony could be of assistance to the jury was not unreasonable, and the admission of the testimony was not an abuse of discretion." For the most part, the court pointed out (*id.* at 35a), the testimony was "general insofar as it described organized crime's infiltration of labor unions and did not touch upon" the particular facts of this case. The court also noted (*id.* at 36a) that petitioner did not object to the court's instruction that the testimony could be considered by the jury as bearing on the enterprise element of the RICO conspiracy count.

ARGUMENT

1. Petitioner contends that the evidence supporting his conviction for obstructing a criminal investigation, in violation of 18 U.S.C. 1510, was insufficient in two respects. First, petitioner claims (Pet. 23-32) that the evidence was insufficient to establish either that there was an ongoing federal investigation or that petitioner specifically intended to obstruct a federal, as opposed to a state, investigation. Second, petitioner claims (Pet. 32-39) that Section 1510 does not apply to transactions between

accomplices and that, in any event, the return of Matthews' own money to him cannot constitute bribery within the meaning of that statute. Neither contention has merit.

a. Petitioner mistakenly relies (Pet. 23) on *United States* v. *Siegel*, 717 F.2d 9 (2d Cir. 1983), for the proposition that Section 1510 requires an ongoing criminal investigation at the time of the alleged obstruction. The Second Circuit in *Siegel* left that question open (717 F.2d at 21), but the terms of the statute are clear. Section 1510 forbids anyone to attempt "by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to * * * any individual duly *authorized* by a department, agency, or armed force of the United States *to conduct or engage in investigations of* or prosecutions for violations of the criminal laws of the United States." 18 U.S.C. 1510 (emphasis added). There is no requirement in the statute that an investigation into the violations in question have already commenced at the time of the alleged obstruction. It is clearly sufficient if the "investigator" to whom the information was to be passed was "authorized * * * to conduct" such an investigation. Obstructing information that would precipitate an investigation is as much a violation of Section 1510 as obstructing information that would further an investigation that has already begun. *United States* v. *Zemek*, 634 F.2d 1159, 1176-1177 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981); *United States* v. *Lippman*, 492 F.2d 314, 317 (6th Cir. 1974), cert. denied, 419 U.S. 1107 (1975).

In any event, the court of appeals found (Pet. App. 46a-50a) that there was ample evidence from which the jury could have concluded that a federal criminal investigation was in existence prior to payment of the bribe to Matthews. Indeed, "[i]t was in the course of that investi-

gation that the FBI obtained wiretap authorizations for the home of Castellano and secured the surveillance tapes" that exposed the decision to bribe Matthews (*id.* at 50a). Furthermore, there was sufficient evidence to show, contrary to petitioner's contention (Pet. 28-30), that petitioner and his co-defendants were concerned that Matthews would go to federal and not just state investigators. Daly reported to petitioner that Matthews had threatened to go to the FBI, and Castellano and petitioner discussed Matthews' supposed connections to Congressman Lent. Pet. App. 52a. From that evidence, as the court of appeals concluded (*ibid.*), the jury could reasonably infer that the defendants feared that Matthews might make his disclosures to federal investigators.

b. Section 1510 seeks to protect communications to federal investigators "by any person." The statute draws no distinction between accomplices and innocent informants. Indeed, one of the express purposes of the statute, as the court of appeals noted (Pet. App. 53a), was "to preserve potential lines of communication from members of organized crime as well as from innocent informants." See H.R. Rep. 658, 90th Cong., 1st Sess. 2 (1967); *United States* v. *Lester*, 749 F.2d 1288, 1299 (9th Cir. 1984). Thus, petitioner is plainly wrong in claiming (Pet. 36-37) that his bribery of Matthews could not fall within Section 1510 because Matthews was an accomplice in the separate scheme to bribe Daly.[5]

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[5] *United States* v. *Cameron*, 460 F.2d 1394 (5th Cir. 1972), upon which petitioner relies (Pet. 32-36), is not to the contrary. In that case, Cameron and Wright were prospective legal counsel for a man charged with bank robbery. Cameron instructed Wright not to say anything to FBI agents about the whereabouts of part of the robbery proceeds. During subsequent FBI questioning, both Cameron and Wright falsely denied any knowledge of the funds. They were subsequently indicted as accomplices for endeavoring to obstruct com-

Even less persuasive is petitioner's suggestion (Pet. 37-38) that the return to Matthews of his own money could not constitute a bribe. As the court of appeals noted (Pet. App. 54a-55a), the bribe money paid by Matthews more than a year earlier "could no longer be considered funds belonging to Matthews" since "he plainly did not have an enforceable right either to recover those funds or to win damages for breach of his bargain." Furthermore, the question whether petitioner and the others gave money to Matthews as a bribe to prevent him from going to the authorities or simply because they "regretted not having given him the labor peace he had sought to buy" was properly a question for the jury, and "there was ample evidence from which it could infer that the $50,000 payment to Matthews was intended to purchase his silence" (*id.* at 55a-56a).

2. Finally, petitioner asserts (Pet. 40-54) that the trial court improperly allowed an expert witness to provide

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munication to the FBI of information relating to the violation of a criminal statute, in violation of 18 U.S.C. 1510. 460 F.2d at 1396 n.3.

The Fifth Circuit held that the indictment failed to allege an offense under Section 1510 because the indictment required Wright to play two contradictory roles, as both an accomplice of Cameron in preventing information being given to the FBI, as well as the person who had the information that Cameron wanted to suppress. It simply was impossible, the court stated (460 F.2d at 1401-1402), for Cameron *and* Wright to have imposed silence on Wright as the indictment charged. The court said that if the government wanted to prosecute Cameron for advising Wright not to say anything about the money, the government "should have left Wright out as an accomplice in that enterprise." *Id.* at 1402 (footnote omitted). The indictment in this case did not have the flaw identified in *Cameron* because Matthews was not charged as an accomplice in the plot to keep him from revealing information to federal authorities. The *Cameron* court did not in any way suggest that an accomplice in a separate criminal violation could not be the victim of a Section 1510 violation, which was the way this case was charged.

background information to the jury about organized crime and labor racketeering. It is well settled, however, that a trial court's decision to admit expert testimony under Fed. R. Evid. 702 is not to be disturbed on appeal unless that decision is "manifestly erroneous." *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962). The court of appeals carefully canvassed the witness's testimony and concluded (Pet. App. 33a) that it was "properly admitted" to provide the jury with relevant information "that was outside the expectable realm of knowledge of the average juror." In particular, the court noted (*id.* at 34a), the testimony was useful insofar as it explained jargon used in the intercepted conversations and identified "the various labor unions and their officials" mentioned in those conversations. See *United States* v. *Angiulo,* No. 86-1965 (1st Cir. May 24, 1988), slip op. 45-46; *United States* v. *Ardito,* 782 F.2d 358, 363 (2d Cir.), certs. denied, 475 U.S. 1141 and 476 U.S. 1160 (1986); *United States* v. *Riccobene,* 709 F.2d 214, 230-231 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

The court of appeals emphasized (Pet. App. 35a) that the testimony did not touch upon the specific facts of this case. "The only element of an offense on which [the agent's] testimony touched directly was the existence of a RICO enterprise, as he gave his understanding of the existence of organized crime and the Gambino family" (*id.* at 35a-36a). The trial court instructed the jury that the testimony was to be considered only to help the jury understand the intercepted conversations and that the jury was not to consider the testimony as evidence of any crime except as "proof of the overall continuing enterprise." As the court of appeals noted (*id.* at 36a), petitioner did not object to that instruction and, in any event, "such an objection [would not] have been sustainable" in light of the agent's "unchallenged qualifications to testify as an expert."

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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